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6 IN THE UNITED STATES DISTRICT COURT
7 FOR THE DISTRICT OF ARIZONA

8
9 Trevor Davis Missell,) No. CV 13-8226-PCT-JAT
10 Plaintiff,)
11 vs.)
12 Carolyn W. Colvin, Acting Commissioner)
13 of Social Security,)
14 Defendant.)
15 _____)

16 Plaintiff filed for social security disability benefits. After a hearing before an
17 Administrative Law Judge (“ALJ”), Plaintiff’s application was denied. Doc. 11-3 at 14-25.
18 Plaintiff has appealed that denial to this Court.

19 Plaintiff alleges three claims of error on appeal: 1) the ALJ improperly rejected the
20 testimony of the treating physician; 2) the ALJ misinterpreted the opinion of a consulting
21 physician; and 3) the ALJ did not have substantial evidence upon which to discredit the
22 testimony of Plaintiff. Doc. 12 at 2.

23 **I. Factual background**

24 The parties are familiar with the factual background in this case, and it is summarized
25 in the ALJ’s decision. Doc. 11-3 at 14-25. Therefore, the Court will reference it only as
26 necessary to the decision below.

27 **II. Review of ALJ’s Decision**

28 The ALJ’s decision to deny benefits will be overturned “only if it is not supported by

1 substantial evidence or is based on legal error.” *Magallanes v. Bowen*, 881 F.2d 747, 750 (9th
 2 Cir. 1989). In determining whether there is substantial evidence to support a decision, this
 3 Court considers the record as a whole, weighing both the evidence that supports the ALJ’s
 4 conclusions and the evidence that detracts from the ALJ’s conclusions. *Id.* If there is
 5 sufficient evidence to support the ALJ’s determination, the Court cannot substitute its own
 6 determination. *See Young v. Sullivan*, 911 F.2d 180, 184 (9th Cir. 1990). Additionally, the
 7 ALJ is responsible for resolving conflicts in medical testimony, determining credibility, and
 8 resolving ambiguities. *See Andrews v. Shalala*, 53 F.3d 1035, 1039 (9th Cir. 1995). Thus,
 9 if on the whole record before this Court, substantial evidence supports the ALJ’s decision
 10 and the decision is free of legal error, this Court must affirm it. *See Hammock v. Bowen*, 879
 11 F.2d 498, 501 (9th Cir. 1989); *see also* 42 U.S.C. § 405(g).

12 **III. Claims of Error on Appeal**

13 Before the Court turns to the particular claims of error on appeal, the Court notes that
 14 an overarching argument of Plaintiff appears to be that the ALJ did not properly address
 15 Plaintiff’s substance abuse. The Government has summarized the law regarding the ALJ’s
 16 obligations regarding a claimant’s substance abuse as follows:

17 In cases where an ALJ finds that a claimant who is abusing drugs or
 18 alcohol is disabled, she must undertake a “DAA” analysis as to whether such
 19 substance abuse is material to the finding of disability. See 20 C.F.R. §
 20 404.1535; *see also* 42 U.S.C. § 1382c(a)(3)(J); Social Security Ruling (SSR)
 21 13-2p, 78 Fed. Reg. 11,939, 11,941 (Feb. 20, 2013). If the ALJ determines
 22 pursuant to the DAA analysis that the individual would not be found disabled
 23 absent the substance abuse, then she must find the claimant not disabled. *See*
 24 20 C.F.R. § 404.1535; SSR 13-2p, 78 Fed. Reg. at 11,941. As here, where the
 25 ALJ finds that the claimant is not disabled regardless of his substance abuse,
 26 she need not conduct the DAA analysis.

27 Doc. 15 at 8, n.4. Plaintiff does not dispute this summary of the law. However, Plaintiff
 28 does argue that without doing a DAA analysis, the ALJ nonetheless used Plaintiff’s
 substance abuse as a basis to find Plaintiff not disabled. The Court will address this issue in
 the context of each of Plaintiff’s arguments below.

29 **A. ALJ’s rejection of the treating physician’s opinion**

30 Plaintiff argues that the ALJ improperly rejected the testimony of his treating

1 psychiatrist, Dr. Nagella. Doc. 12 at 5.

2 “Where a treating physician’s opinion is not contradicted by another doctor,
 3 it may be rejected only for clear and convincing reasons. *Thomas v. Barnhart*,
 4 278 F.3d 947, 956-57 (9th Cir.2002). However, the ALJ can reject the opinion
 5 of a treating physician in favor of the conflicting opinion of another examining
 physician “if the ALJ makes ‘findings setting forth specific, legitimate reasons
 for doing so that are based on substantial evidence in the record.’ ” *Id.* at 957
 (quoting *Magallanes v. Bowen*, 881 F.2d 747, 751 (9th Cir.1989)).”

6 *Connett v. Barnhart*, 340 F.3d 871, 874 (9th Cir. 2003).

7 In this case, Dr. Nagella treated Plaintiff on March 12, 2010, and diagnosed Plaintiff
 8 with various mental limitations. Doc. 11-3 at 22. The ALJ rejected Dr. Nagella’s diagnosis
 9 for two reasons. First, the ALJ found that Dr. Nagella accepted Plaintiff’s subjective
 10 complaints without regard to Plaintiff’s on-going substance abuse. Doc. 11-3 at 23. Second,
 11 the ALJ found that Dr. Nagella’s opinion was not supported by the greater record, regardless
 12 of Plaintiff’s substance abuse. *Id.*

13 The record in this case reveals that Plaintiff has a long and significant history of
 14 substance abuse. Doc. 11-3 at 19 (finding a history of Plaintiff abusing heroin,
 15 methamphetamine, marijuana, alcohol, and Seroquel (obtained from a friend), and misuse
 16 of Plaintiff’s own prescription medications). However, as the Government noted in footnote
 17 4 of its brief, the ALJ determined that even while using all of these drugs, Plaintiff was not
 18 disabled. Therefore, the ALJ did not have to do a DAA analysis. Conversely, Plaintiff
 19 argues that if his drug use was the basis to discredit, for example, the opinion of his treating
 20 physician, then the ALJ’s conclusion that Plaintiff is not disabled regardless of his drug
 21 abuse is inconsistent reasoning; and, therefore, there is a lack of substantial evidence to
 22 support the ALJ’s ultimate decision. Doc. 12 at 5.

23 Turning to the ALJ’s second reason for rejecting Dr. Nagella’s testimony, the ALJ
 24 found it was not supported by the record as a whole. Specifically, the ALJ noted that the
 25 November 2011 progress notes from the West Yavapai Guidance Center (“WYGC”) showed
 26 Plaintiff had far higher functioning than Dr. Nagella’s opinion. Doc. 11-3 at 23. Because
 27 this was also a treating source for Plaintiff (*id.* at 16), the ALJ was correct to compare the
 28 treating source medical information and to decide which source to credit. *See Andrews*, 53

1 F.3d at 1039. Further, the ALJ also credited the state agency reviewing physicians over Dr.
2 Nagella because the state agency physicians' findings were consistent with the record as a
3 whole, including the WYGC's progress notes and Plaintiff's own reports of his daily
4 activities. *Id.*

5 Thus, the Court finds the ALJ set forth specific and legitimate reasons supported by
6 substantial evidence of record for not crediting Dr. Nagella's opinion. As a result, the Court
7 need not consider the ALJ's alternative reason for rejecting Dr. Nagella's opinion.

8 **B. The ALJ's summary of Dr. Gill's opinion**

9 Plaintiff argues that the ALJ gave "greater weight" to the opinion of examining
10 physician, Dr. Gill, but mis-characterized Dr. Gill's opinion. Doc. 12 at 7. Specifically, the
11 ALJ stated that greater weight was given to Dr. Gill's opinion, "to the extent [the opinion]
12 supports a finding that claimant can perform simple and repetitive tasks on a regular and
13 sustained basis with limited social contact in the workplace." Doc. 11-3 at 12. On appeal,
14 Plaintiff argues that Dr. Gill's opinion, taken as a whole, does not support that Plaintiff can
15 perform simple and repetitive tasks on a sustained basis. Doc. 12 at 7.

16 The ALJ is responsible for resolving conflicts and ambiguities in the evidence, not this
17 Court. *See Andrews*, 53 F.3d at 1039. Further, if the evidence is susceptible to more than
18 one rational interpretation, one of which supports the ALJ's decision, then this Court will
19 affirm the decision. *Id.* at 1040.

20 Here, the ALJ finds that Dr. Gill's assessment supports a conclusion, specifically that
21 Plaintiff "can perform simple and repetitive tasks on a regular and sustained basis with
22 limited social contact in the workplace." Doc. 11-3 at 12. The Court has reviewed Dr. Gill's
23 assessment. Doc. 11-9 at 72-80. The Court finds that Dr. Gill's assessment, while subject
24 to more than one interpretation, is consistent with the ALJ's conclusion. Therefore, this
25 Court will not substitute its judgment for that of the ALJ. Accordingly, the Court will not
26 reverse the ALJ on this basis.

27 **C. Plaintiff's symptom testimony**

28 Plaintiff claims the ALJ erred in rejecting his testimony regarding his symptoms. This

1 Court has held that:

2 An ALJ must engage in a two-step analysis to determine
 3 whether a claimant's testimony regarding subjective pain or
 4 symptoms is credible. *Lingenfelter*, 504 F.3d at 1035–36. First,
 5 as a threshold matter, “the ALJ must determine whether the
 6 claimant has presented objective medical evidence of an
 7 underlying impairment ‘which could reasonably be expected to
 8 produce the pain or other symptoms alleged.’” *Id.* at 1036
 9 (quoting *Bunnell*, 947 F.2d at 344). The claimant is not required
 10 to show objective medical evidence of the pain itself or of a
 11 causal relationship between the impairment and the symptom.
Smolen, 80 F.3d 1273, 1282 (9th Cir. 1996). Instead, the
 12 claimant must only show that an objectively verifiable
 13 impairment “could reasonably be expected” to produce the
 14 claimed pain. *Lingenfelter*, 504 F.3d at 1036 (quoting *Smolen*,
 15 80 F.3d at 1282); *see also* SSR 96–7p at 2; *Carmickle*, 533 F.3d
 16 at 1160–61 (“reasonable inference, not a medically proven
 17 phenomenon”). If the claimant fails this threshold test, then the
 18 ALJ may reject the claimant’s subjective complaints. *See*
Smolen, 80 F.3d at 1281 (citing *Cotton v. Bowen*, 799 F.2d 1403
 19 (9th Cir. 1986) (reaffirmed in *Bunnell*, 947 F.2d 341)).

20 Second, if the claimant meets the first test, then “the ALJ
 21 ‘may not discredit a claimant’s testimony of pain and deny
 22 disability benefits solely because the degree of pain alleged by
 23 the claimant is not supported by objective medical evidence.’”
Orteza v. Shalala, 50 F.3d 748, 749–750 (9th Cir. 1995)
 24 (quoting *Bunnell*, 947 F.2d at 346–47). Rather, “unless an ALJ
 25 makes a finding of malingering based on affirmative evidence
 26 thereof,” the ALJ may only find the claimant not credible by
 27 making specific findings supported by the record that provide
 28 clear and convincing reasons to explain his credibility
 evaluation. *Robbins*, 466 F.3d at 883 (citing *Smolen*, 80 F.3d at
 1283–84 (“Once a claimant meets [step one] and there is no
 affirmative evidence suggesting she is malingering, the ALJ
 may reject the claimant’s testimony regarding the severity of her
 symptoms only if he makes specific findings stating clear and
 convincing reasons for doing so.”)); *see also*, e.g., *Lingenfelter*,
 504 F.3d at 1036 (if the ALJ has found no evidence of
 malingering, then the ALJ may reject the claimant’s testimony
 “only by offering specific, clear and convincing reasons for
 doing so”).

29 *Trembulak v. Colvin*, No. CV-12-02420-PHX-JAT, 2014 WL 523007, at *8–9 (D. Ariz. Feb.
 30 10, 2014)).

31 In this case, the ALJ found that Plaintiff had, “medically determinable impairments
 32 [that] could reasonably be expected to cause the alleged symptoms.” Doc. 11-3 at 19. Thus,
 33 the ALJ could reject Plaintiff’s self-reported symptoms only if the ALJ found evidence of
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1 malingering or made specific findings supported by the record which provided clear and
2 convincing reasons to explain the ALJ's credibility evaluation.

3 First, the ALJ suggested that there was malingering. *Id.* Specifically, the ALJ stated:

4 "one has to question [Plaintiff's] motivation for work in light of his history of
5 intravenous drug abuse including heroin and methamphetamine, as well as
6 continued marijuana smoking. [Plaintiff] failed to differentiate between his
alleged disability and his substance abuse. [Plaintiff] appears motivated to
continue using drug, as he even misuses prescription medication."

7 *Id.*

8 In response to this finding, Plaintiff argues on appeal that it was inappropriate for the
9 ALJ to consider his drug abuse without doing a DAA analysis. Doc. 12 at 8-9. In sum, what
10 Plaintiff appears to be arguing is that the ALJ may not consider Plaintiff's drug use in any
11 way unless the ALJ is going to presume that Plaintiff is disabled and do a DAA analysis.
12 The Court has found nothing in the social security regulations cited by the parties that
13 suggests that the ALJ may not consider Plaintiff's drug use as a factor in the ALJ's analysis
14 unless the ALJ is going to find the claimant disabled. Said a different way, while the CFRs
15 require drug use to be considered when a claimant is found to be disabled, neither party has
16 cited anything that requires the ALJ to wholly pretend drug use does not exist in making the
17 initial disability determination.

18 Nonetheless, the Court has done its own research and determined that the Ninth
19 Circuit Court of Appeals has held that an ALJ committed error when the ALJ, at step two,
20 determined that a claimant's behavioral and emotional problems were the result of his
21 alcohol abuse and not "independently severe or disabling." *Bustamante v. Massanari*, 262
22 F.3d 949, 954-55 (9th Cir. 2001). In conclusion the Court of Appeals held, "If, and only if,
23 the ALJ found that Bustamante was disabled under the five-step inquiry, should the ALJ have
24 evaluated whether Bustamante would still be disabled if he stopped using alcohol." *Id.* at
25 955.

26 Thus, the *Bustamante* decision suggests that the ALJ must make the initial disability
27 determination without regard to whether the alcohol or drug abuse is the cause of the
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1 symptoms. However, what *Bustamante* does not speak to is whether the ALJ can consider
2 drug using in making a credibility determination.

3 Here, the ALJ clearly considered Plaintiff's long history of drug use in evaluating
4 whether Plaintiff was motivated to return to work. Further, the ALJ found that Plaintiff's
5 focus on drug use was his true motivation for not working. The Court finds this was not
6 improper, and was a finding of malingering sufficient to reject Plaintiff's subjective
7 complaint testimony.

8 Alternatively, even if the ALJ erred in relying on Plaintiff's drug use in evaluating his
9 credibility, the ALJ gave several other reasons for finding Plaintiff not credible. First, the
10 ALJ found that Plaintiff's testimony about the intensity, persistence and limiting effects of
11 his symptoms was inconsistent with his testimony about his daily activities and his overall
12 abilities. Doc. 11-3 at 19. Second the ALJ found that Plaintiff's testimony was not reliable
13 because it was inconsistent regarding Plaintiff's drug and alcohol abuse (showing that
14 Plaintiff was an inaccurate historian about himself). *Id.* Third, Plaintiff testified
15 inconsistently regarding how his last job ended. *Id.* Fourth, Plaintiff was not cooperative in
16 returning his paperwork regarding his state application for disability benefits. *Id.* at 20.
17 Fifth, Plaintiff's testimony regarding his symptoms was inconsistent with the objective
18 clinical and laboratory evidence in the record. *Id.*

19 The Court finds that these are clear and convincing reasons to find Plaintiff not
20 credible and to reject his symptom testimony. On appeal, Plaintiff does not argue that these
21 are not clear and convincing reasons to reject Plaintiff's testimony. Instead, Plaintiff
22 attempts to take each reason in turn and explain why the reason is not supported by
23 substantial evidence of record. Thus, Plaintiff argues that this Court should review the record
24 and reject each of the ALJ's reasons as unsupported by the record.

25 As listed above, first the ALJ found that Plaintiff's testimony about the intensity,
26 persistence and limiting effects of his symptoms was inconsistent with his testimony about
27 his daily activities and his overall abilities. On appeal, Plaintiff does not dispute this factual
28 finding. Instead, makes a legal argument that a claimant having some limited daily activities

1 does not mean the claimant is not disabled. Doc. 12 at 9 (citing *Robinson v. Barnhart*, 469
 2 F.Supp.2d 793 (D. Ariz. 2006). In this case, however, the ALJ did not state Plaintiff was not
 3 disabled because he had limited daily activities. Instead the ALJ found that Plaintiff's daily
 4 activities as recounted by Plaintiff, including maintaining personal care, eating, smoking
 5 marijuana, riding his bike, eating out, collecting food at a food bank, and doing some house
 6 work, were inconsistent with Plaintiff's testimony regarding the severity of Plaintiff's
 7 symptoms. Doc. 11-3 at 20. Thus, the ALJ found Plaintiff not credible for this reason,
 8 which is different than finding the Plaintiff not disabled for this reason. The Court finds this
 9 reason is supported by substantial evidence of record. *See generally Berry v. Astrue*, 622
 10 F.3d 1228, 1235 (9th Cir. 2010) (finding that claimant's self-reported daily activities
 11 undermined claimant's credibility regarding his claims about the severity of his limitations).

12 Second, the ALJ found Plaintiff testified inconsistently about his prior drug use. On
 13 appeal, Plaintiff does not factually dispute this finding. Instead, Plaintiff makes a legal
 14 argument that it was inappropriate for the ALJ to consider his drug use without doing a DAA
 15 assessment. The Court finds it was not error for the ALJ to consider inconsistencies in
 16 Plaintiff's testimony as evidence that he was not credible. *See generally Thomas v. Barnhart*,
 17 278 F.3d 947, 959 (9th Cir. 2002) (discounting the claimant's credibility because she
 18 presented conflicting information about her drug and alcohol use). Therefore, the Court finds
 19 this reason is supported by substantial evidence of record.

20 Third, the ALJ found that Plaintiff gave inconsistent testimony regarding how his last
 21 job ended, thereby undermining his credibility. Specifically, the ALJ found that Plaintiff told
 22 the WYGC that he was fired from his job, but testified before the ALJ that he quit his job.
 23 Doc. 11-3 at 19. Plaintiff factually disputes this finding on appeal as follows: "The ALJ
 24 asked 'So you actually quit the job then?' and [Plaintiff] answered 'Yes, you could say that.'
 25 [citation omitted]. It was the ALJ that indicated [Plaintiff] quit his job so there is no
 26 discrepancy." Doc. 12 at 9.

27 The Court finds this argument disingenuous. Specifically, Plaintiff argues on appeal
 28 that the ALJ asking a question amounts to the ALJ making up facts even though the Plaintiff

1 answered yes to the question. Clearly this finding of the ALJ is supported by the record —
2 indeed by Plaintiff's own testimony — and Plaintiff's claim of error on appeal is wholly
3 unfounded.

4 Fourth, the ALJ found Plaintiff was not credible because Plaintiff was not cooperative
5 in returning his paperwork regarding his state application for disability benefits. On appeal,
6 Plaintiff does not dispute that he did not turn in his paperwork in a timely fashion. Instead,
7 he argues that the ALJ improperly weighed this evidence because his failure to return his
8 paperwork should have been weighed as evidence of his problems. Doc . 12 at 9-10.

9 It is the ALJ's duty to resolve ambiguities in the evidence and assess credibility. *See*
10 *Andrews*, 53 F.3d at 1039. This Court cannot substitute its judgment for the ALJ simply
11 because the evidence could be given more than one possible meaning. *See Young*, 911 F.2d
12 at 184. Accordingly, the Court find that there is substantial evidence of record to support the
13 ALJ's finding on this fourth reason for finding Plaintiff not credible.

14 Fifth and finally the ALJ discredited Plaintiff because Plaintiff's symptom testimony
15 was inconsistent with the medical evidence. On appeal, Plaintiff makes one factual claim of
16 error and one legal claim of error. Regarding the legal claim, Plaintiff argues that the ALJ
17 cannot discredit a claimant's testimony solely because it is not supported by objective
18 medical evidence. Doc. 12 at 10 (citing *Reddick v. Chater*, 157 F.3d 715, 722 (9th Cir.
19 1998)). Here, the ALJ did not discredit Plaintiff because there was not objective medical
20 evidence to support his symptoms. Instead, the ALJ discredited Plaintiff because his
21 testimony about the severity of his symptoms was inconsistent with the objective evidence.
22 Accordingly, the Court finds the ALJ did not commit any error on this basis.

23 As to the claim of factual error, Plaintiff argues that the ALJ mis-characterized Dr.
24 Towns' notes. The ALJ's recounts Dr. Towns' notes as follows: "Progress notes from Dr.
25 Town[]s between May and November 2011 show the claimant had normal range of motion,
26 strength, muscle tone, sensation, and deep tendon reflexes in all extremities, with normal gate
27 and station." Doc. 11-3 at 20. The ALJ then concluded that these progress notes were
28 inconsistent with Plaintiff's testimony regarding his upper right extremity and neck

1 complaints. *Id.* Plaintiff argues on appeal that Dr. Towns proscribed pain medication and
 2 performed a cervical nerve block, which Plaintiff argues are consistent with Plaintiff's
 3 testimony. Doc. 12 at 10.

4 As discussed above, the ALJ is responsible for reviewing and resolving conflicts in
 5 the medical testimony. *Andrews*, 53 F.3d at 1039. Plaintiff does not dispute that everything
 6 the ALJ recounted is in Dr. Towns' notes. Plaintiff instead disputes how the ALJ interpreted
 7 that medical evidence and asks this Court to substitute its judgment for that of the ALJ to
 8 conclude that there is no substantial evidence to support the ALJ's decision. However, this
 9 Court cannot substitute its judgment for the ALJ. *See generally Flaten v. Sec'y of Health and*
 10 *Human Servs.*, 44 F.3d 1453, 1457 (9th Cir. 1995). Thus, because the ALJ accurately
 11 recounted Dr. Towns' progress notes, which were inconsistent with Plaintiff's testimony
 12 about the severity of his limitations, the Court finds there is substantial evidence to support
 13 the ALJ's decision. Accordingly, the Court finds no error on this basis.

14 **D. Plaintiff's drug abuse**

15 As discussed above, although Plaintiff did not raise the ALJ's failure to do a DAA as
 16 a specific claim of error on appeal, throughout his brief Plaintiff suggests that the ALJ's
 17 failure to do a DAA analysis was error. As also discussed above, the Ninth Circuit Court of
 18 Appeals has held that it is error for the ALJ to rely on a plaintiff's alcoholism as a basis to
 19 find him not disabled at Step 2. *Bustamante*, 262 F.3d at 954-55.

20 Preliminarily, as further discussed above, the Court notes that neither party has cited,
 21 nor has the Court located, a case or regulation that prohibits an ALJ from considering drug
 22 and alcohol abuse in assessing a claimant's credibility. Thus, to the extent the ALJ
 23 considered Plaintiff's drug abuse in this case as a factor bearing on his credibility, the Court
 24 finds no error.

25 To the extent the ALJ considered Plaintiff's drug abuse in other respects in the ALJ's
 26 determination that Plaintiff is not disabled, such consideration appears to run afoul of
 27 *Bustamante*, 262 F. 3d at 955. The Court has framed this issue as "to the extent" because
 28 whether the ALJ considered Plaintiff's drug abuse is somewhat ambiguous in this case.

1 Specifically, in conclusion the ALJ states: “Because the claimant is not disabled, regardless
 2 of his continued polysubstance abuse, his addictions are not contributing factors nor material
 3 in any way to a finding of disability in this matter.” Doc. 11-3 at 25. Based on this sentence,
 4 it would appear that the ALJ did not consider Plaintiff’s drug abuse and there was no error.

5 However, in the next two sentences, the ALJ goes on to state: “The undersigned finds
 6 the claimant’s mental impairments are treatable when he abstains from drugs and alcohol and
 7 takes prescribed medications as directed. The claimant bears the burden of proving that
 8 alcoholism and drug addiction are not a contributing factor material to the determination of
 9 disability, and the undersigned finds he has failed to do so. see [sic] James Ball v. Massanari,
 10 254 F.3d 817 (9th Cir. 2011).” Doc. 11-3 at 25.

11 In *Ball*, the Ninth Circuit Court of Appeals held that the ALJ is not required to
 12 “separate out” a claimant’s drug or alcohol abuse at Step 2 unless the record indicates there
 13 are other non-substance-abuse-related impairments that are “severe” and would pass Step 2.
 14 254 F.3d at 823. Based on the ALJ’s first sentence, quoted above, it appears that in this case
 15 the ALJ found that Plaintiff had no such severe impairments and therefore, under *Ball*, the
 16 ALJ did not have to separate out the abuse (or do a DAA analysis). Accordingly, there was
 17 no legal error.

18 However, the second and third sentences quoted above appear to be more along the
 19 line of either a DAA analysis or a conflating of the DAA analysis with the initial
 20 determination of disability. To the extent these sentences reflect an in the alternative DAA
 21 analysis, there was no error. To the extent these sentences reflect that the ALJ considered
 22 Plaintiff’s drug abuse in finding him not disabled, such consideration is likely error under
 23 *Bustamante*, 262 F.3d at 955. An error of this nature, however, is subject to a harmless error
 24 review. *See Parra v. Astrue*, 481 F.3d 742, 747 (9th Cir. 2007).

25 In this case, as discussed above, the ALJ gave specific non-drug-use reasons
 26 supported by substantial evidence of record, to find Plaintiff not disabled. These reasons,
 27 standing alone, are an adequate basis to affirm the decision of the ALJ. Therefore, to the
 28 extent the ALJ relied on alternative reasons based on Plaintiff’s drug use, any error was

1 harmless. In other words, the Court will affirm the ALJ's decision based on only the ALJ's
2 cited non-drug-use-related reasons for each of the ALJ's findings and the ALJ's ultimate
3 decision.

4 **IV. Conclusion**

5 Based on the foregoing, the Court finds that the ALJ did not commit any legal error
6 and that the ALJ's decision is supported by substantial evidence of record. Accordingly,

7 **IT IS ORDERED** that the decision of the ALJ is affirmed and the Clerk of the Court
8 shall enter judgment accordingly.¹

9 DATED this 19th day of May, 2014.

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12 
13 James A. Teilborg
14 Senior United States District Judge

27
28 ¹ To the extent a mandate is required, the judgment shall serve as the mandate in this
case.